Supreme Court, U.S.
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92-1648
No. ____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1992

Ann Richards, Governor of Texas; Carol S. Vance, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Clarence N. Stevenson, Allan B. Polunsky, R. H. Duncan, Sr., Gilberto Hinojosa, John R. Ward, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

John Lindsay, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

THE "HARD QUESTION" OF STATE DEFENDANTS' LIABILITY WAS "*EXCLUSIVELY*" A STATE LAW ISSUE WHICH COULD ONLY BE AUTHORITATIVELY DECIDED BY STATE COURTS AND NOT RESOLVED ON A "CONTINGENT" AND "TENTATIVE" BASIS BY FEDERAL COURTS

Despite efforts by both Plaintiffs and County Defendants to confuse the central issue in this case, the gravamen of this petition remains simply *whether State Defendants are liable for conditions of confinement at a local jail operated and managed exclusively by county officials*. State Defendants maintain, as did the Fifth Circuit, that this issue presented a "hard question" of "*exclusively*" state law. Appendix to Petition for Writ of Certiorari [Pet. App.] C 15. State Defendants also maintain that the resolution of this issue on a "tentative" and "contingent" basis, Pet. App. C 30, dependent upon the outcome of state court litigation was inappropriate under principles of federalism, particularly in light of the fact that the state district court decision relied upon by federal courts in making their decision has subsequently been vacated pursuant to settlement.

The fact that the state law basis of the Fifth Circuit's decision has evaporated bears emphasis in light of Plaintiffs' contention that the case is moot. State Defendants have, pursuant to federal court order and *without state legislative authorization*, directly reimbursed a political subdivision of the State of Texas for $12,649,874.25. Petition at 8. Subsequent orders (not the subject of this petition) pose additional financial liability for remedial plans and "fines" or "sanctions." Petition at 8-9; Pet. App. E, G, H. It is hard to seriously contend, given the almost unlimited financial liability imposed on State Defendants by federal courts in this case, that the case is moot.

Nor are Petitioners' contentions moot because there are no longer any state court suits to abstain to. Lower federal courts, ignoring basic principles of federalism, have forced state officials to transfer millions of dollars to a local governmental subdivision to meet the needs of jail inmates, when those officials' responsibility for those inmates was unclear at best. This violation of the structure Our Federalism should not go unremedied; the money should be returned to the state treasury.[1] Moreover, as Petitioners have consistently urged in the alternative in the Court of Appeals below, (and so urge here) if there remains any uncertainty about whether Petitioners are required, under the terms of the state court settlements, to do more than they are currently doing to alleviate the conditions of inmates, the question of Petitioners' responsibilities under those settlements entered pursuant to current state law should be certified to the Texas Supreme Court. See Memorandum Brief of State Appellants (in appeal after remand) at 2-3 (adopting all arguments raised in appeal before remand); Brief of State Appellants (in first appeal before remand) at 55-56; Memorandum Reply Brief of State Appellants (in appeal after remand) at 8 n. 10; and letter of August 26, 1992 (filed in appeal after remand), citing supplemental authority in support of certification. (Copies of relevant portions of Briefs and letter lodged with Clerk of the Court.)[2]

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[1] This would not mean that the Plaintiff inmates would be denied a remedy for the conditions in the jail. There is nothing in this case to suggest that the County Respondents lack or have ever lacked the financial means to alleviate conditions in the jail.

[2] The assertions of the Plaintiff-Inmate Respondents at 13 of their Brief in Opposition and the County Respondents' at 24 of theirs that Petitioners did not raise the issue of certification below in the appeal after remand are thus simply false. It seems that Respondents, who are so free with charges of misrepresentation, would take greater pains to be accurate themselves. In this connection, Petitioners strongly object to the strategy of the County Respondents in particular to characterize every disagreement Petitioners have with them as a misrepresentation. See County Brief in Opposition at 27-30. Petitioners dispute all charges that they have misrepresented the facts or the law or that they have cited to materials that are not properly before this Court or that this Court may not take judicial notice of.

On the other hand, the state court decisions which constituted the sole basis for State Defendants liability in the district court and Fifth Circuit -- and which Plaintiffs and County Defendants have so persistently and recklessly advanced to contest this Petition -- *are* moot, having been vacated pursuant to H.B. 93 and settlement agreements.[3]

County Defendants try to circumvent this issue by relying on federal decisions ruling that the state must accept inmates from a local jail facility. However, the cases relied upon by the County[4] dealt with factual situations in which federal courts ordered state inmates to be received by the state facilities pursuant to state law. Here in contrast, it is undisputed that State Defendants had a duty "only" to accept inmates pursuant to a statutory allocation formula. TEX. GOV'T CODE ANN. § 499.121(a) (Vernon Supp. 1993), Pet. App. AA 1. In this regard, the lower federal courts repeatedly enjoined State Defendants to maintain that allocation formula. Pet. App. U 8, V 3, W 3-4. Indeed, the remedy imposed herein was not an injunction that the state should accept state-sentenced inmates into state correctional facilities. Rather, here state officials were simply ordered to compensate county officials for state inmates kept in custody of the Harris County sheriff. But state law is emphatically explicit that the counties were financially responsible for all prisoners in their jails:

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[3] The remarks the Plaintiffs and County Defendants cite from *Tarrant County Commissioners Court v. Markham*, 779 S.W.2d 872, 874-75 (Tex. App. - Fort Worth 1989, writ denied) do not constitute any kind of decision on these issues. The issue in that case was Markham's standing to bring a class action. The remarks cited are consequently *dicta* and were especially gratuitous (and unfair) given that Petitioners at that time were not parties to that case and had had no opportunity to present their side of the story.

[4] See County Respondents' Brief in Opposition at 6 n.11, citing *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986), *cert. denied sub nom., Cuomo v. Koehler*, 480 U.S. 910 (1987); *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984).

> "[A] county is liable for all expenses incurred in the safekeeping of prisoners confined in county jails or kept under guard by the county.

TEX. CODE CRIM. PROC. ANN. art. 104.002 (Vernon Supp. 1993); Op. Atty. Gen. JM-743 (1987) (counties, not state are liable for medical expenses of parole violator in state's legal custody but confined in county jail"), Pet. App. BB; Op. Atty. Gen. JM-730 (1987) (counties, not state, liable for medical expenses of state inmates confined in county jail on bench warrant), Pet. App. CC. See also Petition at 10-11. And the question of financial liability was "*exclusively*" a question of state law which State Defendants maintain federal courts did not have authority to decide or, alternatively, should have resolved by deferring to ongoing state court proceedings under the abstention doctrine or certified to the Texas supreme court. Petition at 15-26.

Nor can Plaintiffs or County Defendants reasonably rely on the Fifth Circuit's decision in *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982), a Mississippi case decided under Mississippi, not Texas law. This is especially the case when the only federal case involving the liability under *state law* of Texas state officials for unconstitutional conditions in a local jail explicitly held that, in the absence of supervisory responsibility over local jails, state officials could not be liable for conditions in those jails. *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986). (Texas state officials who set standards for and inspect local jails held not responsible for conditions in local jail).[5] See also *Rizzo v. Goode*, 423 U.S. 362, 375-76 (1976).

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[5] This is especially the case when the state officials involved in *Bush* had the legal authority to transfer inmates to other county jails. TEX. GOV'T CODE ANN. § 511.012(b) (Vernon 1990). Here in contrast, state prison officials had no such authority to transfer prisoners to other county jails or even involvement in such transfers prior to the passage of H.B. 93. (TEX. GEN. & SPECIAL LAWS 1991, 2d Called Sess., Ch. 10, pp. 180-226 [eff. August 29, 1991]).

Plaintiffs and County Defendants attempt to justify the rulings below by reliance on *Milliken v. Bradley*, 433 U.S. 267 (1977). First of all, this strategy begs the question: Can a federal court even resolve a state law financial dispute between two state entities when the issue of liability rested "*exclusively*" on "hard questions" of state law? In this regard, it is hard to contend, as the Plaintiffs and County Defendants do, that state officials are "current constitutional violators" when their liability is unsettled or at best "tentative" and "contingent" upon the determination by state courts of what state law means. For this reason, the attempt of the County and Plaintiffs (and the Court of Appeals) to distinguish *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee v. State of Tennessee*, 836 F.2d 986 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988), likewise rests on question-begging: one cannot distinguish *Kelley* by assuming that the State Defendants are "current constitutional violators," when that assumption can be made only by first deciding a state-law dispute that *Kelley* says federal courts should stay out of.

Second, "[t]he order to pay is ancillary only to itself, in other words, and therefore it goes beyond *Milliken*." *Kelley*, 836 F.2d at 992. Here the "relief" ran *exclusively* to County Defendants[6] and was not incidental to any injunctive relief State Defendants owed to the Plaintiffs class. State Defendants have never been required to take any significant action (above what they were already doing) other then pay the County money (directly or indirectly) to offset the cost of actions it was ordered to undertake. This is in contrast to *Milliken*, where, as the court in *Kelley* pointed out, "the payment of money was not perceived to be all that was required of the State Defendants . . ." *Kelley*, 836 F.2d at 991, and *see id.*, 836 F.2d at 991-992.

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[6] The *Alberti* court had explicitly found that "State Defendants are liable to County Defendants on County Defendants' Third-Party Complaint." Pet. App. Y 33.

Third, the vitality of the *Milliken* decision has been seriously questioned in light of the Supreme Court's ruling in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984) as the Sixth Circuit indicated in *Kelley*, 836 F.2d at 992. In fact, Justice Powell in his concurring opinion in *Milliken* stressed the "uniqueness" of the decision "and the consequent limited precedential effect of much of the Court's Opinion." *Milliken*, 433 U.S. at 292 (J. Powell, concurring); *see Kelley*, 836 F.2d at 992.[7]

Plaintiffs and County Defendants also seek to bolster the validity of the district court and Fifth Circuit's decision by citation to diversity cases[8] holding that state law can be enforced during the pendency of an appeal. However, those cases are easily distinguishable on two grounds. First, the state court judgments relied on in this case have been vacated and are of no authoritative value whatsoever. Pet. App. EE and FF.[9] Secondly, it is unlikely that such diversity cases apply at all in the context of the suit against state officials for injunctive relief given this Court's admonition that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court

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[7] *Missouri v. Jenkins*, 495 U.S. 33 (1990), does not alter this reasoning. That case stands for the proposition that when a state law stands as an impediment to a local governmental entity's obligations under a federal consent decree, a federal court may, by injunctive decree, override state law. *Id.* at 57. It does not say that a federal court may order a state governmental entity to reimburse a political subdivision of the state as part of its remedy for a constitutional violation.

[8] See Brief in Opposition of County Respondents at 22 n.57 and Brief in Opposition of Plaintiff-Inmate Respondents at 18, citing *Huron Holding Corp. v. Lincoln Mine Operating Co.* 312 U.S. 183, 189 (1949); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923); and *Fidelity St. Life Ins. Co. v. First Nat. Bank & Trust*, 510 F.2d 272, 273 (5th Cir. 1975), *cert. denied*, 423 U.S. 864 (1975).

[9] The state district court's letter opinion, which the Plaintiffs, the County and the Fifth Circuit have relied on heavily, explicitly stated that it did not constitute findings of fact and conclusions of law and was not published. Thus, under Texas law, it had no authoritative value even before the judgment that came after it was vacated. *See Wheeler v. Aldama-Luebbert*, 707 S.W.2d 213, 216 (Tex. App. - Houston [1st Dist.] 1986, no writ).

instructs state officials on how to conform their conduct to state law." *Pennhurst,* 465 U.S. at 106. Diversity cases involving private parties simply do not raise the profound questions of Eleventh Amendment immunity presented by this case.

Finally, neither the Plaintiffs or County Defendants even ventured near the logical anomaly posed by this case in light of this Court's decision in *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321 (1991): How can state officials be held intentionally liable under the standards of *Seiter* when their underlying state law duty was not clearly established and presented a "hard question" the resolution of which was "tentative" and "contingent" upon the outcome of state court litigation? At the very least, State Defendants should be able to stand on their defense in federal court that they have no duty to remedy local jail conditions until the "hard question" of "***exclusively***" state law is authoritatively resolved by state courts.[10] Petition at 26-29.

CONCLUSION

For these reasons, Petitioners request that a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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[10] Even if this Court should adopt the due process standard which Plaintiff Respondents advance, Brief in Opposition at 21-23, and which Petitioners maintain does not apply, State Defendants simply have no responsibility under state law for pretrial detainees. Accordingly, State Defendants could not logically be held liable for unconstitutional conditions affecting those inmates.

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